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SENATE COMMITTEE ON JURISPRUDENCE

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SENATOR BRANDON CREIGHTON
SENATOR BRYAN HUGHES
SENATOR NATHAN JOHNSON

July 8, 2021

The Honorable Ken Paxton
Attorney General of Texas
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Via e-mail: opinion.committee@oag.texas.gov

Subject: Opinion Request

General Paxton:

I write as Chair of the Senate Jurisprudence Committee to request a written opinion on a question which affects the public interest. This request, which is made pursuant to Texas Government Code § 402.042,¹ seeks an opinion on the following question:

Is a peace officer prohibited from forcing entry into a residence or dwelling to enforce a parole-revocation warrant for the arrest of a releasee (commonly called a "blue warrant"²)?

I appreciate the opportunity to receive analysis from your office on this issue in hopes of providing guidance to law enforcement officers who are called upon to execute blue warrants across our State.

I. Background

The Texas Department of Criminal Justice (TDCJ) has authority to issue orders to certain individuals who are subject to parole or mandatory supervision. *See generally* TEX. GOV'T CODE § 508.251. As relevant to this request, the law provides

- a) In a case of parole or mandatory supervision, the director [of the TDCJ pardons and paroles division] or a designated agent of the director or, in another case, the board on order by the governor, may issue a warrant as provided by Section 508.252 for the return of:
 - (1) a releasee;

¹ *See* TEX. GOV'T CODE §§ 402.042(a) ("the attorney general shall issue a written opinion on a question affecting the public interest or concerning the official duties of the requesting person"), (b)(7) ("an opinion may be requested by a committee of a house of the legislature.").

² These warrants are called "blue warrants" because, historically, they have been printed on blue paper. *See* HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS, TEX. S.B. 1428, 80th Leg., R.S. (2007) at 1.

- (2) an inmate released although not eligible for release;
 - (3) a resident released to a preparole or work program;
 - (4) an inmate released on emergency reprieve or on emergency absence under escort; or
 - (5) a person released on a conditional pardon.
- b) A warrant issued under Subsection (a) must require the return of the person to the institution from which the person was paroled or released.

TEX. GOV'T CODE § 508.251 (a)-(b).³

In this context, the law further provides that

A warrant or summons may be issued under Section 508.251 if:

- (1) there is reason to believe that the person has been released although not eligible for release;
- (2) the person has been arrested for an offense;
- (3) there is a document that is self-authenticating as provided by Rule 902, Texas Rules of Evidence, stating that the person violated a rule or condition of release; or
- (4) there is reliable evidence that the person has exhibited behavior during the person's release that indicates to a reasonable person that the person poses a danger to society that warrants the person's immediate return to custody.

TEX. GOV'T CODE § 508.252.

This type of "warrant authorizes any officer named by the warrant to take custody of the person and detain the person until a parole panel orders the return of the person to the institution from which the person was released." TEX. GOV'T CODE § 508.254(b).

II. Question Presented

The above provisions give the TDCJ authority to issue a warrant for the arrest of a person released on parole or mandatory supervision when there is evidence that the person should never have been released, that the person has violated the terms of their release, or that the person has committed a new crime. *See id.* §§ 508.251, .252. The Government Code does not, however, specify whether force may be used when executing this type of warrant. *See id.*

By contrast, in a section titled "WHAT FORCE MAY BE USED," the Code of Criminal Procedure specifies that "[i]n making an arrest, all reasonable means are permitted to be used to effect it. No greater force, however, shall be resorted to than is necessary to secure the arrest and detention of the accused." TEX. CODE CRIM. PROC. art. 15.24. The Code of Criminal Procedure further makes explicit

³ *See also, e.g.*, TEX. GOV'T CODE § 508.001(1) ("Board' means the Board of Pardons and Paroles"), (3) ("Director' means the director of the pardons and paroles division"), (5) ("Mandatory supervision' means the release of an eligible inmate sentenced to the institutional division so that the inmate may serve the remainder of the inmate's sentence not on parole but under the supervision of the pardons and paroles division"), (6) ("Parole' means the discretionary and conditional release of an eligible inmate sentenced to the institutional division so that the inmate may serve the remainder of the inmate's sentence under the supervision of the pardons and paroles division"), (9) ("Releasee' means a person released on parole or to mandatory supervision").

that, “[i]n case of felony, the officer may break down the door of any house for the purpose of making an arrest, if he be refused admittance after giving notice of his authority and purpose.” *Id.* art. 15.25.⁴

Because the Government Code lacks similar statutory direction regarding what force may be used to execute a blue warrant, some have asked whether an officer executing a blue warrant may force entry into a residence or dwelling in order to do so. I believe that both law enforcement and the public would benefit from an opinion from your office on this question.

III. Authority

I am not advised of any legal authority preventing a Texas peace officer from forcing entry into a residence or dwelling where doing so is reasonably necessary to effect an arrest under a blue warrant.⁵

Both Texas and federal case law do indicate, however, that constitutional protections for probationers, parolees, and those on mandatory supervision⁶ are less robust than the protections enjoyed by other Texans. For instance, law enforcement may search the residence or dwelling of such a person based on “reasonable suspicion” of criminal activity⁷ (as opposed to the “probable cause” required in most other contexts).⁸ Similarly, a person arrested for violating parole conditions is not entitled to bail, because the Texas constitutional right to bail does not apply to prisoners after conviction.⁹ Similar logic applies to an arrest for violating terms of release—under such circumstances, a “warrantless arrest [i]s valid,” because “parolees [are] not afforded the same rights as persons merely suspected of a crime.”¹⁰

⁴ The Texas Court of Criminal Appeals has, however, held that law enforcement’s failure to comply with these provisions does not render an arrest illegal. *See Jones v. State*, 568 S.W.2d 847, 857 (Tex. Crim. App. 1978) (“we disagree with the appellant that non-compliance with Articles 15.25 and 15.26 [] renders an arrest illegal.”).

⁵ *See generally Steagald v. United States*, 451 U.S. 204, 214, n.7 (1981) (Observing that, “because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person’s privacy interest when it is necessary to arrest him in his home . . .”).

⁶ In Texas, “[a]n inmate released to mandatory supervision is considered to be released on parole.” TEX. GOV’T CODE § 508.147(b). And federal courts “do not distinguish between parolees and those on supervised release for the purpose of determining their constitutional rights.” *United States v. Garcia-Avalino*, 444 F.3d 444, 446 n.5 (5th Cir. 2006) (citations omitted). To the extent that Texas courts distinguish between parolees and probationers, “parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.” *Samson v. California*, 547 U.S. 843, 850 (2006). *See also, e.g., Garrett v. State*, 791 S.W.2d 137, 140 (Tex. Crim. App. 1990) (“A parolee, while free of the prison walls, still remains under legal custody.”) (citation omitted) (superseded by statute as stated in *Diaz v. State*, 110 S.W. 3d 181, 184 (Tex. App.—San Antonio 2003, pet. ref’d)). Thus, Texas constitutional protections for parolees will not exceed those of probationers.

⁷ *See, e.g., United States v. LeBlanc*, 490 F.3d 361, 365 (5th Cir. 2007) (“to conduct a nonconsensual search of a probationer’s home for ordinary law enforcement purposes . . . it is necessary to show reasonable suspicion that the probationer is engaged in criminal activity.”) (citing *United States v. Knights*, 534 U.S. 112, 121 (2001)).

⁸ *See, e.g., Gates v. Tex. Dep’t of Protective & Regulatory Servs.*, 537 F.3d 404, 420 (5th Cir. 2008) (recognizing that a warrantless intrusion into an ordinary person’s home is “presumptively unreasonable unless the person consents, or unless probable cause and exigent circumstances justify” the intrusion) (citations and quotation marks omitted); *Alabama v. White*, 496 U.S. 325, 330 (1990) (“Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.”).

⁹ *See* TEX. CONST. art. I, § 11 (right to bail); *Ex Parte Laday*, 594 S.W.2d 102, 103 (Tex. Crim. App. 1980) (constitutional right to bail applies only to prisoners prior to conviction). *See also, e.g., Faheem-El v. Klinicar*, 841 F.2d 712, 728-29 (7th Cir. 1988) (state’s failure to provide parolees with a bail hearing when they were arrested on new bailable criminal charges did not violate the Eighth Amendment or the due process clause of the Fourteenth Amendment).

¹⁰ *Garrett v. State*, 791 S.W.2d at 140. *See also, e.g., United States v. Butcher*, 926 F.2d 811, 814 (9th Cir. 1991) (“[P]robable cause is not required to arrest a parolee for a violation of parole. Warrantless arrests of parole violators are also valid.”).

Blue warrants are valid arrest warrants¹¹ and “[a] valid arrest warrant provides an officer the authority to enter the residence of the person named in the warrant in order to execute the warrant.”¹² Nevertheless, some have questioned what force may be used to do so in this context. Thus, I request that your office issue an opinion on the conditions under which an officer may force entry into a residence or dwelling to execute a blue warrant for the arrest of a releasee under Texas Government Code Sections 508.251 and 508.252.¹³

Thank you for your attention to this matter. Should you have any questions regarding this request, you may contact my committee office at 512-463-0395.

Sincerely,

A handwritten signature in cursive script that reads "Joan Huffman". The signature is written in black ink and is positioned below the word "Sincerely,".

Joan Huffman
Chair, Senate Committee on Jurisprudence

¹¹ *E.g.*, *Garrett*, 791 S.W.2d at 140-41.

¹² *Applon v. State*, 2015 Tex. App. LEXIS 3972, *12 (Tex. App.—Houston [14th Dist.] 2015, pet. ref’d) (mem op.) (citing *Morgan v. State*, 963 S.W.2d 201, 203 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *Payton v. New York*, 445 U.S. 573, 603 (1980)).

¹³ *See generally Steagald v. United States*, 451 U.S. at 214, n.7 (Observing that, “because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person’s privacy interest when it is necessary to arrest him in his home[.]”).